

STATE OF MICHIGAN
COURT OF APPEALS

DIANE BUKOWSKI and MICHIGAN CITIZEN,

Plaintiffs-Appellees/Cross-
Appellants,

v

CITY OF DETROIT,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

May 26, 2005

No. 256893

Wayne Circuit Court

LC No. 02-242574-CZ

Before: Whitbeck, C.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant appeals and plaintiffs cross-appeal as of right from the trial court's partial grant of summary disposition in favor of plaintiffs in this action brought under the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq.* We reverse and remand.

I. Facts and Procedure

On May 1, 2000, Detroit Police Chief Benny Napoleon appointed Detroit Police Deputy Chief Walter Shoulders to chair an Executive Board of Review (EBR) for the purpose of reviewing the alleged misconduct of Detroit police officers, including Officer Eugene Brown, who was involved in multiple fatal shootings of civilians, and the Detroit Police Department's responses to that conduct. The EBR prepared a report of its findings and recommendations regarding the matter, known as the "Shoulders Report." On June 6, 2002, plaintiff Diane Bukowski, a reporter for plaintiff Michigan Citizen, filed a FOIA request with defendant seeking disclosure of a complete copy of the Shoulders Report. Defendant denied the FOIA request, citing the following reasons for the denial:

Your request is denied pursuant to MCL 15.243(1)(b)(i) and (ii) for the reason that the report you requested is an investigating record compiled for law enforcement purpose[s] and disclosing the report would interfere with law enforcement proceedings and deprive Officer Brown and others [of] the right to a fair trial or impartial administrative adjudication. Moreover, contained in the Shoulder[s] report are communications and notes with[in] a public body of an advisory nature to the extent they cover other than purely factual material and are

preliminary to a final agency determination of policy or action. Accordingly, your request is also denied pursuant to MCL 15.243(1)(m).

Plaintiffs filed suit pursuant to the FOIA, seeking release of the Shoulders Report. Both parties moved for summary disposition. After reviewing the evidence, the trial court concluded: “I’m satisfied that the government has met its burden of proving that much of the Shoulders report is exempt and those portions of the report that are not specifically exempted and are pure and factual are discoverable.” The trial court held that the “evaluative, deliberative, conclusionary, [and] interpretive” portions of the report, along with the EBR’s factual findings and summaries, fell within the FOIA “frank communications” exemption, MCL 15.243(1)(m), and “personnel records of law enforcement agencies” exemption, MCL 15.243(1)(s)(ix). However, according to the trial court, the purely factual portions of the Shoulders report, such as evidence of tech reports, witness statements, and witness names, were not exempt from disclosure. The trial court then entered an order granting in part plaintiffs’ motion for summary disposition and authorizing the release of a redacted version of the Shoulders Report. In doing so, the court denied plaintiffs’ counsel’s request for an in camera inspection of the Shoulders Report. The court subsequently entered an order staying the release of the redacted Shoulders Report pending appeal.

II. Analysis

A. Exemptions From Disclosure under the FOIA

1. Standard of Review

This Court reviews de novo a trial court’s decision whether to grant or deny a motion for summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). Review is limited to the evidence proffered to the trial court at the time the motion was decided. *Pena v Ingham Co Rd Comm’n*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id.* at 278.]

We also review de novo the application of FOIA exemptions involving legal determinations. *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 101, 106-107; 649 NW2d 383 (2002). But we review for clear error the application of FOIA exemptions involving discretionary determinations, such as application of the exemptions requiring the trial court to engage in a balancing of public interests. *Id.* at 106-107. Thus, we review for clear error application of both the frank communications exemption, *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 265 Mich App 185, 193-194, 205; 693 NW2d 850 (2005), lv pending (Supreme Court Docket No. 128263), and the personnel records of a law enforcement agency exemption, *Federated Publications, supra* at 106-107; *Herald Co, Inc v Kent Co Sheriff’s Dep’t*, 261 Mich App 32, 37; 680 NW2d 529 (2004). “A finding is ‘clearly erroneous’ if, after

reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made.” *Federated Publications*, *supra* at 107.

2. Discussion

Defendant argues that the entire Shoulders Report, including the factual portions, is exempt from disclosure under MCL 15.243(1)(m) and (s)(ix). Defendant contends that the trial court erred in partially denying its motion for summary disposition and ordering the release of the factual portions of the Shoulders Report. On cross-appeal, plaintiffs argue that the exemptions are not applicable, and that the trial court should have ordered defendant to disclose the entire Shoulders Report. Plaintiffs contend that the trial court erred in partially granting defendant’s motion for summary disposition and exempting from disclosure portions of the Shoulders Report.

The FOIA provides that a public body must disclose its records that are not specifically exempted under the act. MCL 15.233(1); *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997). The exemptions are to be narrowly construed, and the public body bears the burden of proving that a record is exempt from disclosure. *Federated Publications*, *supra* at 109; *Herald Co v City of Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000). If the public record contains both exempt and nonexempt material, it must separate the exempt material from the nonexempt material and make the nonexempt material available for examination and copying. MCL 15.244(1). “[A] public body is permitted to redact any information that falls within an exemption of the FOIA.” *Bradley*, *supra* at 304.

(a) The Personnel Records of Law Enforcement Agencies Exemption

We first address the applicability of the personnel records exemption from disclosure, MCL 15.243(1)(s)(ix), which provides:

(1) A public body may exempt from disclosure as a public record under this act:

* * *

(s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do any of the following:

* * *

(ix) Disclose personnel records of law enforcement agencies.

Internal affairs investigatory records of a law enforcement agency fall within the meaning of personnel records that satisfy the exemption under MCL 15.243(1)(s)(ix). *Kent Co Deputy Sheriffs Ass’n v Kent Co Sheriff*, 463 Mich 353, 365-367; 616 NW2d 677 (2000); *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 223; 514 NW2d 213 (1994).

Here, according to the affidavits of Deputy Chief Shoulders, Chief Napoleon, and Detroit Police Chief Jerry Oliver, the Shoulders Report consists of the EBR’s review of the actions of

the members of the Detroit Police Department, including Officer Brown, and the Detroit Police Department's responses to those actions. The Report contains the EBR's findings and recommendations regarding Officer Brown and other Detroit police officers. According to the affidavit of Chief Napoleon, the Shoulders Report was going to be used in part "to determine whether disciplinary action should be commenced against Officer Brown or other Detroit police officer(s)" This Court has previously held that internal investigations into a police officer's conduct in order to determine possible discipline for such conduct falls under the personnel records exemption. See, e.g., *Herald Co, Inc v Kent Co Sheriff's Dep't*, *supra* at 34, 37-38 (where this Court determined that the personnel records exemption applied to the Kent County Sheriff's Department's documentation of its investigation to determine whether a Deputy's arrest for soliciting sexual acts from an undercover police officer posing as a prostitute merited discipline). Although the Shoulders Report does not concern an investigation, it appears to concern a review of police officers' conduct to determine whether disciplinary action would be appropriate. Such information would also fall within the personnel records exemption.¹ However, without access to the Shoulders Report itself, we are unable to verify that such personnel information is actually included in the Report.

In order to show that the personnel record portions of the Shoulders Report are exempt from disclosure under MCL 15.243(1)(s)(ix), defendant must also meet its burden of proving that the public interest in disclosure does not outweigh the public interest in nondisclosure. *Federated Publications*, *supra* at 108-109. Here, the trial court recited the statutory language and the proper balancing test, but failed to properly apply this test in concluding that the deliberative portions of the Report were exempt from disclosure. The trial court appears to have been somewhat confused regarding the burden of proof in this matter. In referring to the personnel records exemption, the trial court clearly misstated the burden of proof when it stated, "[T]hen it's the job of the *proponent of disclosure* to demonstrate that the individual's privacy interests are outweighed by the public interest in disclosure" [Emphasis added.] Subsequent to this misstatement, the trial court utilized the correct burden of proof: "So I'm satisfied that the government has met its burden of proving that much of the Shoulders report is exempt and those portions of the report that are not specifically exempted and are pure and factual are discoverable." Despite reciting the correct burden of proof in this instance, the court failed to properly employ this burden in practice. The trial court did not state on the record how defendant had proven that the public interest favored nondisclosure in this case. In fact, the court does not appear to have conducted a balancing test at all with respect to portions of the Shoulders Report that it determined fell within the personnel records exemption. Therefore, we remand this case for proper application of the personnel records exemption.² The trial court should organize

¹ The entire personnel record portions of the Shoulders Report, including the purely factual portions, fall within the personnel records exemption. The personnel records exemption, unlike the frank communications exemption, makes no reference to purely factual materials not falling within the exemption. "The omission of a provision in one part of a statute that is included in another should be construed as intentional, . . . and provisions not included by the Legislature should not be included by the courts." *Polkton Charter Twp v Pellegrum*, 265 Mich App 88, 103; 693 NW2d 170 (2005).

² That a portion of the Shoulders Report falls within the personnel records exemption does not
(continued...)

the Shoulders Report into reasonably specific categories in order to allow it to weigh similarly competing aspects of the public interest in the particular instance of this case. See *Federated Publications*, *supra* at 110.

(b) The Frank Communications Exemption

The frank communications exemption from disclosure, MCL 15.243(1)(m), provides, in pertinent part:

(1) A public body may exempt from disclosure as a public record under this act:

* * *

(m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.

“In order to prevent disclosure under this subsection, the public body must first establish that (a) the documents cover other than purely factual materials and (b) the documents are preliminary to a final determination of policy or action.” *Herald Co v Ann Arbor Pub Schools*, 224 Mich App 266, 274; 568 NW2d 411 (1997).

Here, it appears that the non-personnel record portions of the Shoulders Report cover other than purely factual materials. According to affidavits submitted by defendant, the Shoulders Report includes a critical analysis of the Detroit Police Department’s policies and procedures and criticism of the Detroit Police Department and some of its executives and employees. There is also an indication that the Shoulders Report was compiled as preliminary to an ultimate determination of department policy or action, as Chief Napoleon stated that the Shoulders Report was going to be used in part “to determine whether there is a need for revision or refinement of departmental policies and procedures.” Plaintiff argues that, although the Shoulders Report may have been prepared as “preliminary to a final agency determination of policy or action,” the frank communications exemption does not apply because there is no

(...continued)

shield the remainder of the Report from disclosure. To hold otherwise would place form over substance and would undermine the FOIA policy of complete and full disclosure of information regarding governmental affairs, MCL 15.231(2). C.f. *Newark*, *supra* at 219-220 (holding that “[a]n interpretation of the [personnel records] exemption that would allow a law enforcement agency to shield any record from disclosure by merely placing it in a folder labeled ‘personnel file’ would undercut the policy of full and complete disclosure mandated by the FOIA.”). Conversely, that the personnel records exemption does not apply to all or part of the Shoulders Report does not preclude all or part of the Report from falling within another exemption from disclosure.

evidence that the Shoulders Report is *currently* preliminary to any agency determination of policy or action. We direct the trial court to address this issue on remand. On remand, the court should take into account that MCL 15.243(1)(m) provides that the frank communications exemption applies only if the communications “*are* preliminary to a final agency determination of policy or action” (emphasis added), not “*were* preliminary to a final agency determination of policy or action.” Thus, if the Shoulders Report contains communications that are no longer preliminary to an agency determination of policy or action, the frank communications exemption does not apply to these communications.

Defendant argues that the factual portions of the Shoulders Report were so intertwined with the remainder of the Report that they too should be exempt. Under the express language of the frank communications exemption, MCL 15.243(1)(m), purely factual materials are not exempt from disclosure. Any factual material that may be inextricably intertwined with the communicative material in the Report is not “purely factual” material that would fall within MCL 15.243(1)(m). However, if on remand the trial court determines that any factual portions of the Shoulders Report are inextricably intertwined with any portions that may fall within the frank communications exemption, such factual material is not “purely factual” and should also be exempt under the frank communications exemption. If the trial court determines that any portion of the Shoulders Report is exempt from disclosure under the frank communications exemption, it should use a common-sense approach in determining the public’s access to any purely factual material “in a form that is severable without compromising the private remainder of the documents.” *Environmental Protection Agency v Mink*, 410 US 73, 91; 93 S Ct 827; 35 L Ed 2d 119 (1973) (discussing a similar exemption in the federal Freedom of Information Act of 1966, 5 USC 552).

After showing that the communications cover other than purely factual materials and are preliminary to a final agency determination of policy or action, the public body must also establish “that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.” MCL 15.243(1)(m). Here, as with the personnel records exemption, the trial court recited the proper statutory language, but failed to properly apply the balancing test. In referring to the frank communications exemption, the trial court first recited the proper burden of proof: “This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.” The Court also explained, “So in this instance it would be the City’s burden to demonstrate that secreting these communications is important to Detroiters.” However, the court later stated, “[T]he privilege protecting deliberative and evaluat[ive material] may be overcome by a sufficient showing of need. I can’t say on this record, either in the arguments or in the briefs and documentation, that the plaintiff[s] have shown any sufficient need to have the deliberative and evaluative data.” In this instance, the trial court misstated the burden of proof by stating that plaintiff bore the burden with respect to the balancing test set forth in MCL 15.243(1)(m). *Federated Publications*, *supra* at 109. Subsequent to this misstatement, the trial court articulated the correct burden of proof. In practice, however, it appears that the court erroneously placed the burden on plaintiffs to show a public interest in disclosure and found that plaintiffs had failed to meet this burden. Further, the court failed to correctly apply the balancing test by neglecting to state on the record what reasons

given by defendant supported its finding that nondisclosure would more properly benefit the public interest. Thus, we remand for proper application of the frank communications exemption.

B. In Camera Inspection of Shoulders Report

On cross-appeal, plaintiffs also argue that the trial court erred in rejecting their requests for an in camera inspection of the Shoulders Report. We disagree.

In determining whether a communication is exempt from disclosure under the FOIA, the public body claiming the exemption must supply detailed affidavits justifying why a particular document, or category of documents, is exempt. *Evening News Ass'n v Troy*, 417 Mich 481, 503, 516; 339 NW2d 421 (1983). The trial court should normally resolve the matter under this first step. *Id.* at 516. However, to determine whether the party claiming an exemption from disclosure has set forth a sufficient particularized justification for the exemption, the trial court might have to conduct a hearing in camera in instances where the government is reluctant or antagonistic, or the court is in doubt. *Id.*³ The court may be able to resolve the matter under this step if the matter is relatively clear and not too complex. *Id.* But if the determination of whether an exemption from disclosure applies is not clear or simple, the court may have to consider allowing the plaintiff's counsel to have access to the contested documents in camera under special agreement. *Id.* This third step of allowing the plaintiff's counsel to review the document in camera should be strictly limited and is a last resort to be used only when the first two steps have failed. *Post-Newsweek Stations, Michigan, Inc v Detroit*, 179 Mich App 331, 337; 445 NW2d 529 (1989).

Here, defendant submitted affidavits justifying the exemptions from disclosure, and the trial court reviewed the Shoulders Report in camera before determining that the deliberative portions of the report were exempt. Under *Evening News Ass'n*, the court was not required to allow plaintiffs' counsel an in camera review of the report. C.f. *Nicita v Detroit*, 194 Mich App 657, 665; 487 NW2d 814 (1992) ("under *Evening News Ass'n*, the court is not required to proceed to an in camera review and normally should resolve the dispute under step one"). The *Evening News Ass'n* three-step procedure is intended only to aid in judicial resolution of FOIA claims. *Post-Newsweek Stations, supra* at 338. There is no evidence that the matter in this case is so complex that it could not be resolved by the trial court's in camera inspection of the Shoulders Report. The court did not fail to apply the procedures set forth in *Evening News Ass'n* for reviewing nondisclosure of records sought under the FOIA. Therefore, we conclude that the trial court did not err in refusing to permit plaintiffs' counsel to conduct an in camera inspection of the Shoulders Report.

III. Conclusion

³ In regard to a court's in camera inspection of the public documents, MCL 15.240(4) states, pertinent in part: "The court, on its own motion, may view the public record in controversy in private before reaching a decision" regarding whether a public record is exempt from disclosure.

We remand for the trial court to first determine which portions of the Shoulders Report fall within the personnel records exemption. In regard to portions of the Report falling within this exemption, the trial court must determine whether defendant met its burden of establishing that the public interest in disclosure does not outweigh the public interest in nondisclosure in the particular instance. If the court determines that both of these tests have been met for any portion of the Report, that portion of the Report, including purely factual materials, are exempt from disclosure.

The court must then decide whether the remainder of the Shoulders Report is exempt from disclosure under the frank communications exemption by first addressing whether the remaining portions include communications of an advisory nature that are preliminary to a final agency determination of policy or action. Purely factual material does not fall within this exemption, so any purely factual material that falls outside of the personnel records exclusion must be disclosed.

After determining which, if any, of the remaining portions of the Report fall within the frank communications exemption, the court must for those portions determine whether the defendant has met its burden of showing “that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.” MCL 15.243(1)(m). If the court determines that these two tests have been met for any portion of the remainder of the Report, that portion is exempt from disclosure. If the court concludes that the Shoulders Report contains material that is exempt under the personnel records exemption or the frank communications exemption, as well as material that is not exempt from disclosure, it must redact the Shoulders Report to exclude any exempt material.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens